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WEBSTER'S LEGAL LEGACY

William W. Fisher III

Alfred S. Konefsky and Andrew J. King, eds. *The Papers of Daniel Webster, Legal Papers*, vol. 1, *The New Hampshire Practice*. Hanover, N.H.: University Press of New England, 1982. xxxix + 542 pp. Index. $65.00.

Alfred S. Konefsky and Andrew J. King, eds. *The Papers of Daniel Webster*, vol. 2, *The Boston Practice*. 1983. xx + 656 pp. Appendix and index. $65.00.

Andrew J. King, ed. *The Papers of Daniel Webster*, vol. 3, *The Federal Practice*. 1989. 1:xxxi + 646 pp; 2:vi + 398 pp. Appendixes and index. $110.00.

In the last twenty years, legal history, long a scholarly backwater, has been brought into the mainstream of American history. Writing in the field has expanded rapidly. The number of courses offered—in both law schools and undergraduate programs—has grown correspondingly. Most importantly, the new scholarship and instruction has been marked by a dramatic increase in methodological diversity and sophistication.[1]

The decision by the editors of Daniel Webster's papers to include in their fourteen-volume series three volumes on Webster's legal practice both reflects and will help sustain this revival. Together with *The Legal Papers of John Adams* (1965), *The Law Practice of Alexander Hamilton* (1964–1981), and the legal papers of Abraham Lincoln, now in preparation, they will provide students and scholars an enormously valuable resource in determining what the lives of successful lawyers were like in the years before the Civil War, and how their professional activities affected and were affected by their involvement in political and economic affairs.

The first two volumes, published some years ago, are the more innovative and eye-opening. As Robert Gordon has observed, their objective, largely achieved, is "to furnish materials toward a *social* history of the legal profession."[2] Volume 1 examines Webster's practice, composed primarily of debt-collection cases initiated on behalf of large mercantile houses, during the first eleven years of his professional life when he resided and worked in Boscawen and then Portsmouth, New Hampshire. Volume 2 covers his work, other than

his Supreme Court practice, after he moved to Boston in 1816. The documents pertaining to Webster's practice during those periods are voluminous. Despite the unfortunate loss of his law office files, enough of his business correspondence and court papers survive to fill many letterpress volumes. Professors King and Konefsky have sensibly opted to cull from this pile a relatively small number of cases typifying the various aspects of Webster's work and to reprint an exhaustive set of papers pertaining to each.[3] These vignettes are supplemented by concise and illuminating essays on such subjects as "Legal Education from the Revolution to the Civil War," "The Law of Inheritance," and "Marine Insurance," that together provide a remarkably complete picture, not only of the career of a talented and ambitious New England lawyer, but also of the many substantive fields of law he invoked and helped modify.

In the course of these case studies, King and Konefsky venture a number of original observations regarding the shape of antebellum legal practice. They identify, for instance, the delicate (though, at the time, ethically unproblematic) combination of functions performed by a rural lawyer during the period: assessment of the credit-worthiness of local merchants; expeditious debt-collection (most often through settlements or arbitration) when business conditions were good; administration of an informal bankruptcy system when conditions were bad. Another essay convincingly documents the transition, reflected in the changing rules and customs pertaining to attorney fees, from an "ideal of the lawyer as gentleman," pursuing his calling out of love and public-spiritedness, to "a newer entrepreneurial ethic that conceived of the practice of law as a money-making enterprise" (2:120). A brief study of early federal bankruptcy law and Webster's efforts as a legislator to reinvigorate it is equally helpful.

The recently published third volume in the series, which covers Webster's practice before the United States Supreme Court and his associated activities in Washington, is less pathbreaking. Much of the material it contains (with the notable exception of the papers pertaining to Webster's patent and land title litigation) has been raked over by several generations of historians, and Professor King's interpretive essays add only modestly to our understanding of them. His introductory discussion of Webster's style of appellate advocacy, for instance, is less perceptive than G. Edward White's treatment of the same subject in *The Marshall Court and Cultural Change* (1988), Paul Erikson's examination of Webster's rhetoric in *The Poetry of Events* (1986), or the pertinent chapter of Robert Ferguson's *Law and Letters in American Culture* (1984). Nevertheless, the compilation of Webster's correspondence, notes, and briefs associated with the more influential of his cases, combined with King's precise and helpful sketches of their casts of characters and doctrinal contexts, con-

tributes in at least two ways to our understanding of those controversies and of the antebellum legal system in general.

First, it enables us to assess more accurately the degree to which the Supreme Court's decision making during this period was affected by Webster's advocacy. It has long been acknowledged that Webster's role was significant. He argued 168 cases before the Court—many of them recognized then and now as crucial to the interpretation of the federal Constitution—and won several of the most important. But the extent to which Webster affected the reasoning and results of those cases has been disputed. Maurice Baxter, in his thorough early study, *Daniel Webster and the Supreme Court* (1966), and again in his recent biography, *One and Inseparable* (1984), attributes to him very considerable influence, suggesting, for example, that Justice Marshall's opinion for the Court in *Dartmouth College v. Woodward* (1819) and dissenting opinion in *Ogden v. Saunders* (1827) were derived in large measure from Webster's arguments in those cases. G. Edward White, in his study of the Marshall Court mentioned above, is more skeptical. Though conceding that he was "the most important of the Marshall Court lawyers," White suggests that Webster's intense desire for public esteem (and the lucrative fees generated by fame), combined with his skill at self-promotion, led contemporaries and have led subsequent historians to exaggerate his capacity to sway Marshall and his more scholarly but similarly minded colleague, Justice Story.

Professor King sides with Baxter. For example, he credits Webster with development of the distinction between public and private corporations that Marshall and Story seized upon in *Dartmouth College* and that has provided the foundation of the modern law of municipal and business corporations. But the materials King has assembled suggest the opposite; in most of these controversies, Webster comes across as masterful, perhaps brilliant, in deciding when and how to present arguments to the Supreme Court, but dependent upon others for the arguments themselves. So, in *Dartmouth College*, not only the distinction between public and private corporations, but also the constitutional doctrines shielding the charters of the latter from legislative modification were in large part developed, these papers make apparent, by the lawyers who handled the case at the trial level—who in turn were drawing in part upon Justice Story's prior opinion in *Terrett v. Taylor* (1815). In sum, it appears that, in law as in politics, Webster was less an inventor than a compiler and arranger of ideas.

Second, the materials in this new volume, when combined with the papers published previously, cast light on a fundamental feature of the legal profession in the early nineteenth century. A number of recent essays have suggested that attorneys during this period cherished and to a large extent conformed to an ideal of "republican" advocacy. A responsible lawyer, they

believed, strove not only in his "extra-professional" activities, but also in his daily advice to his clients to advance justice and the common good. To preserve his capacity to perceive and pursue the "general interest," it was crucial that he not become the servant of any particular client or indeed of any economic or social faction. Thus the prevalence in early bar association speeches and publications of paeans to "disinterestedness" and jeremiads bewailing the spread of selfishness and "corruption."[4]

Webster's Legal Papers bear in complex ways on this theme. One's first impression is that Webster's career as charted in these books is violently inconsistent with the republican ideal. Blessed with all of the advantages that supposedly make independence and civic virtue possible—a solo (or virtually solo) practice; skills and renown sufficient to enable him to pick his clients and maintain long-term relationships with them; and constant involvement (as congressman, senator, and cabinet officer) in national politics—he nevertheless conformed in all too many ways to the modern image of the corporate hired gun. He accepted, indeed solicited, retainers from wealthy Boston merchants and the Bank of the United States, whose interests he then assiduously promoted through both legislation and litigation. The foremost consideration in his choice of clients seems to have been the magnitude of the fees they were likely to pay. Once he had accepted cases, he thought of and conducted them as military campaigns. Lawyers for other parties were not participants in a collaborative effort to secure justice, but "adversaries" to be "conquered," obstacles in his quest for "the glory of victory" (3:198). To protect his clients and enlarge his income, he engaged in a striking amount of outright lying. In contrast to Justice Story or Justice Parker of Massachusetts, who had well developed views regarding the capacity and responsibility of judges and lawyers, through public statements of their convictions, "to get the people on the side of right principles"[5] (3:183), Webster, when deciding whether and how to publish his appellate arguments, seems to have had little more in mind than recruiting popular opinion on behalf of his clients and enhancing his own reputation. All this is a far cry from the image of lawyer as statesman.

And yet some of these papers suggest that Webster may have remained more committed to the republican model of advocacy than his behavior would indicate. In both private letters and public speeches he frequently professed allegiance to its tenets. So, for example, in his eulogy to Justice Story, he dwelt on his friend's virtue, simplicity, and "pure love of country," concluding with a quotation from Henri Francois d'Aguesseau that captured much of the republican ideal: "One searches in vain to distinguish in him the private from the public person; the same spirit animates both; the same goal unites them; the man, the father, the citizen, all are consecrated in him to the glory of the

judge" (3:696). Equally important, his arguments before the state and federal courts are shot through with a remarkably stable and well-developed political philosophy. In contrast to the modern litigator, who tends to be something of an ideological chameleon, Webster (at least once he had abandoned the New England sectionalism of his youth) consistently advanced in letters to clients and in the courtroom (as well as in the Senate chamber) a distinctive conception of the United States and the appropriate responsibilities of its various branches of government. The central elements of that vision were: Congress could and should act aggressively, by establishing financial institutions, adjusting tariffs, regulating commerce, protecting inventions, and promoting transportation systems, to improve and integrate the country economically; the federal courts should be vigilant in ensuring that the state legislatures neither discriminate against nonresident persons or corporations, nor interfere with interstate commerce, nor abrogate contractual entitlements or the sacred rights of private property; and, above all, the Union should be preserved and strengthened. To some extent, of course, the persistence with which Webster advanced this agenda can be explained on the grounds that it served the interests of his corporate clients and was exactly what most of the justices of the Supreme Court, at least during Marshall's tenure, wanted to hear. But especially in the later stages of Webster's working life, when the Court was less amenable to such arguments, his fidelity to these principles must be attributed at least in part to a sincere and durable commitment to a particular vision of the public interest.

In sum, although over the course of his career Webster surely became more and more a minion of the antebellum entrepreneurial elite, it is something of an exaggeration to suggest, as does Konefsky in his otherwise illuminating introduction to the first of these volumes, that "[h]is notion of service altered from a publicly balancing function toward a concept of a private facilitator and manipulator of services to further private interests" (1:xxxviii). To the end, Webster aspired, not only as a politician, but also as a lawyer to maintain his independence of factions and patrons, to serve the nation as a whole[6]—however far short of that ideal he fell in practice.

William Fisher, Harvard Law School, is currently at work on a history of American property law.

1. Helpful studies of these developments include Lawrence Friedman, "American Legal History: Past and Present," *Journal of Legal Education* 34 (1984): 563–76; and Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984): 57–125.

2. Robert Gordon, "The Devil and Daniel Webster," *Yale Law Journal* 94 (1984): 445–60, p. 447.

3. The materials the editors collected but decided not to include in the printed volumes are available to the determined scholar in two microfilm series: *The Papers of Daniel Webster*

(distributed by University Microfilms) and a single microfilm copy of Webster's legal papers, accessible for the time being in the Dartmouth College Archives. Although, in their "Plan of Work," the editors indicate that the latter series will also "be issued with guide and alphabetical list of cases" by University Microfilms, a representative of the company indicates that it has no present intention of doing so.

4. See, *e.g.*, Robert Gordon, "The Independence of Lawyers," *Boston Univ. Law Review* 68 (1988): 1–83; Jean V. Matthews, *Rufus Choate: The Law and Civic Virtue* (1980).

5. The quoted passage is from a letter written to Webster by Justice Parker. Justice Story's deliberate and effective use of his judicial position to proselytize a particular version of New England republicanism is analyzed in R. Kent Newmyer, *Supreme Court Justice Joseph Story* (1985).

6. Webster's commitment to this ideal in his political affairs is documented in Robert Dalzell, *Daniel Webster and the Trial of American Nationalism* (1973) and Sydney Nathans, *Daniel Webster and Jacksonian Democracy* (1973).